THE HIGH COURT

[2022] IEHC 668

[Record No. 2022/5SS]

IN THE MATTER OF THE VALUATION ACT 2001

AND

IN THE MATTER OF A GLOBAL VALUATION PROPERTY 2181796 IRISH RAIL/IARNRÓD ÉIREANN

BETWEEN

IARNRÓD ÉIREANN

APPELLANT

AND

COMMISSIONER OF VALUATION

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 30th day of November, 2022

INTRODUCTION

1. This matter came before me as an appeal by way of case stated from the Valuation Tribunal [hereinafter "the Tribunal"] pursuant to the provisions of s. 39(5) of the Valuation Act, 2001 [hereinafter "the 2001 Act"].

2. The questions posed in the case stated relate to the treatment of depreciation and a payroll saving under a pay reduction agreement in the calculation of the rateable valuation of the national railway network operated by Iarnród Éireann, a public utilities company, by the Commissioner of Valuation [hereinafter "the Commissioner"] in its valuation certificate issued in November, 2015 on foot a global valuation.

BACKGROUND

3. In November, 2015, the Commissioner issued a global valuation certificate under the 2001 Act (as amended) for a valuation date of the 31st of March, 2014 on foot of which the net annual value [hereinafter "NAV"] of €8,930,000.00 was entered in the Central Valuation List in respect of the subject properties of Iarnród Éireann. The NAV means, in relation to property, the rent for which the property might reasonably be let from year to year. The global valuation process is the process used to value certain designated public utility undertakings in the State under s. 53 of the 2001 Act (as amended) for rating purposes. Global valuations are carried out on a five-yearly cycle as provided for by section 53(6) of the 2001 Act (as amended)

4. In this instance, the global valuation was determined by the Commissioner following consideration of representations made by Iarnród Éireann. As with each of two previous global valuations (in 2005 and 2010), the valuation was carried out on a so-called Receipts and Expenditure basis [hereinafter "*R & E*"]. The *R & E* assessment was carried out using the published accounts for Iarnród Éireann for 2014. Iarnród Éireann's published accounts gave a figure for depreciation net of grant amortisation of €28,442,000 as a head of railway undertaking expenditure understood to refer to rolling stock.

5. The Commissioner's position with regard to claimed depreciation on the rolling stock is that depreciation in the profit and loss accounts is the writing off of the cost of an existing asset and reflects the value of the annual consumption of the economic benefits of that asset but it is not actual expenditure. The Commissioner considered that it is non-specific and imposes no obligation to replace the asset. The Commissioner would accept, however, to make deductions relating to actual expenditure on repairs and renewals and expenditure on maintenance as claimed by Iarnród Éireann was allowed in full. The Commissioner stated:

> *"The IRRV Guidance Note on the R & E method states that tenant items may need to renew and/or replacement and an allowance may have to be made. However, there is no evidence that Irish Rail make any allowance for rolling stock renewal in their profit and loss account; it is understood that the State funds such renewals directly when the need arises. In this valuation as in previous global valuations it has been assumed that the State pays for the renewal of rolling stock and similar assets."*

6. In determining the NAV the Commissioner also had regard to payroll savings agreed for a 25-month period (between October, 2014 and October, 2016 inclusive), even though Iarnród Éireann contended that this did not result in annual savings to them and was a once off situation.

7. Iarnród Éireann appealed against the Commissioner's valuation on the grounds that the Commissioner:

- failed to make appropriate allowances for depreciation of Iarnród Éireann's "tenant's assets"; and
- was wrong to make a deduction in respect of a one-off payroll saving.

8. In the Notice of Appeal dated the 3rd of February, 2016 Iarnród Éireann placed greatest emphasis on the depreciation issue. It was stated that under the parameters agreed by the parties for the "*global*" valuation of the entity, it being a public utility undertaking, the whole of the undertaking, including not only its fixed assets (such as infrastructure etc.) but also its moveables (such as rolling stock etc.) were to be valued, with values to be derived from the audited accounts on an application of the *R & E* method. It was contended that without justification the Commissioner had failed to apply the commonly used principles for the treatment of depreciation under the *R & E* method.

9. Iarnród Éireann's position was that if one is to treat its business as being conceptually divided up as between a hypothetical landlord's (fixed) assets and a hypothetical tenant's (moveable) assets, then depreciation ought to be allowed in full as to the tenant's (moveable) assets. Iarnród Éireann contended that the hypothetical tenant should be presumed to have to bear the costs of providing his own moveables (to include rolling stock) for the purpose of arriving at the hypothetical rent, and therefore, in striking the actual rate. It was contended that an integral element of the cost of providing moveables is depreciation of such moveables and this ought to be taken fully into account when arriving at the relevant hypothetical rent. The effect thereof, it is contended, must be to lower that rent, and in turn to lower the rates.

HEARING BEFORE THE TRIBUNAL

10. There was a large modicum of agreement between the parties before the Tribunal. It was agreed between the parties that the relevant property fell to be globally valued by the *R & E* method and that the valuation was to be based on Iarnród Éireann's accounts for the year 2014. The parties also agreed all components of the *R & E* calculation other than the amounts referable to depreciation of tenant's assets and the payroll saving. The Tribunal had the benefit of oral evidence from Iarnród Éireann's Financial Controller, Mr. David Graham, and from Mr. Mark Adamson, a chartered surveyor employed in the Valuation Office.

11. In his evidence, Mr. Graham said that depreciation is a recognition of the consumption of the economic life of the asset as a generator of the associated income and accordingly claimable as an allowable expense. He said that moveable items comprising the rolling stock are tenant items whilst the train track network, stations and other real property are landlord items. He stated that once a train is purchased, it is then used over its useful life to generate an income stream from one year to the next until the life of that asset is consumed. If the life of the asset is 10 years, then depreciation as a measure of the cost of the use and ownership of the asset is used to write off the cost over that 10-year period. He stated that the charge in the profit and loss account for depreciation of plant and machinery and rolling stock represented the depreciation of only those assets that were funded by Iarnród Éireann. He referred to the technical definition of depreciation from an accountancy point of view in FRS 102, the Financial Reporting Standard applicable to the UK and Ireland which states:

> *"the systematic allocation of the depreciable amount of an asset over its useful life. The depreciable amount is 'the cost of an asset or other amount substituted for cost (in the financial statements) less the residual value."*

12. Mr. Graham pointed to the fact that depreciation is considered as an expense in FRS 102 and argued that it was also a legitimate expense item that should be an allowable expense in calculating the NAV under a global valuation. He rejected the proposition that it was a notional expense on the basis that when an asset is purchased it is then used to generate income and depreciation reflects how the value of the asset is used up over time. He posited that depreciation matches the cost of an asset to the income it produces. He agreed, however, that the depreciation shown in Iarnród Éireann's accounts was based on historic cost and accepted that the figure might need to be adjusted because of the different approach to depreciation for

valuation purposes which requires depreciation to be assessed against the market value of the tenant's items as at the relevant valuation date.

13. For his part, Mr. Adams, giving evidence on behalf of the Commissioner stated that the Commissioner had assumed that the State, as part of its public transportation policy had paid for the rolling stock and similar assets and consequently no allowance was made by the Commissioner for the replacement of assets by way of depreciation. He stressed that depreciation was an allowance and not an actual expense. He pointed out that the lifespan of rolling stock for accounting purposes does not equate with the actual life-span of rail rolling stock, some of which was in use beyond the 20 year expected lifespan adopted by Iarnród Éireann for accountancy purposes. The depreciation policy recorded in the 2014 accounts was therefore an accounting exercise that does not reflect market value or the reality of the use of the assets. He referred to para. 680 in Chapter 8 of Ryde on Rating (Guy Roots KC, 'Ryde on Rating and the Council Tax', (LexisNexis, 14th edn, 1991) to make the point that the valuation of the assets as a historical cost was incorrect for valuation purposes which states:

> *"All chattels must be valued at their market value which is many cases will be their replacement value at the valuation date and not at cost."*

THE TRIBUNAL DECISION

14. In a decision delivered on the 9th of June 2020 (the "decision"), the Tribunal agreed with Iarnród Éireann on both counts of its appeal. In essence, the Tribunal held that an allowance for depreciation of tenant's assets (mainly rolling stock, plant and machinery), was permitted but that the Tribunal required expert evidence regarding the level of allowance to be applied.

15. The Tribunal found in its determination that the Commissioner had assumed that the State had paid for all of the rolling stock and similar assets used by the Iarnród Éireann. On the basis of its assumption that no contributions were made by Iarnród Éireann as to the cost of such assets, the Commissioner had consequently made no allowance for depreciation of this stock. The Tribunal referred to the uncontroverted evidence given by Mr. Graham on behalf of the Iarnród Éireann that the it had paid for 25% of the rolling stock and freight vehicles and

it was with regard to those assets only that the Iarnród Éireann's claim for an allowance for depreciation was made.

16. Additionally, the Tribunal found that it was well established that the hypothetical tenant is entitled to allowance to reflect the capital the tenant will invest in the business and that tenant assets will need to be replaced at some stage and that it was clear from the *Joint Professional Institutions' Rating Forum Guidance Note on the R & E Method of Valuation* published in the UK by the Institute of Revenues Rating and Valuation, the Valuation & Lands Agency, the Royal Institute of Chartered Surveyors, the ISVA, the Rating Surveyors' Association and the Scottish Assessor's Association [hereinafter the "*RICS Guidance Note*"] that an allowance for depreciation of the tenant's assets can be made in the context of renewal of the tenant's assets.

17. Relying on the *RICS Guidance Note*, the Tribunal also held that the tenant's assets must be valued according to their market value at the valuation date and the degree of depreciation must be varied according to the age and character of the individual items and any residual value must be deducted.

18. The Tribunal found that any argument that the deprecation figures showing the tenant's accounts are in line with or assessed in accordance with the *RICS Guidance Note* on the *R & E* method of valuation or that those figures should be deducted from the working expenses before arriving at the divisible balance was wholly unsustainable. No reliance could be placed on those figures.

19. The Tribunal's conclusion in respect of depreciation was set out as follows (at para. 10.11):

> *"It is well established that the hypothetical tenant is entitled to allowances for items required to realise the receipts of his business. It is also clear from the Guidance Note that an allowance for depreciation of tenant's assets can be made in the context of renewal of the tenant's assets. In the Tribunal's opinion an allowance may be made for depreciation of hypothetical tenant's assets to reflect the capital the tenant will invest in the business and that tenant assets will need to be replaced at some stage."*

20. The Tribunal considered that the *R & E* approach required expert opinion about the tenant's items at the relevant valuation date bearing in mind their condition and useful life. Accordingly, the Tribunal determined, in principle, that an allowance can be made for the depreciation of the tenant assets but held that it required to hear expert evidence regarding the level of allowance to be applied by reference to the age, condition and likely life of the tenant's assets so as to arrive at a figure for depreciation in respect of same for valuation purposes as follows (at para 10.12):

> *""… It is well established that the hypothetical tenant is entitled to allowances for items required to realise the receipts of his business for that use. Depreciation is a valuation matter to be decided upon expert evidence. Depreciation must be limited to the tenant assets. Tenant assets must be valued at their market value i.e. market value at the valuation date. The degree of depreciation must be varied according to the age and character of the individual items and any residual value must be deducted. The Tribunal is satisfied on the evidence of Mr. Graham that the figures for depreciation shown in the Appellant's account relate to the Appellants' assets only. Mr Graham did accept that the depreciation shown in the Appellant's accounts is based on historic cost and that the figures may need to be adjusted because of the different approach to depreciation for valuation purposes. Accordingly, any argument that the depreciation figures shown in the Appellant's accounts are in line with or assessed in accordance with the Guidance Note on the R & E meth od of valuation or that those figures should be deducted from the working expenses before arriving at the divisible balance is wholly unsustainable and no reliance can be placed on those figures. The R & E approach requires expert opinion about the tenant's items at the relevant valuation date bearing in mind their condition and likely useful life."*

21. The Tribunal concluded on this issue by inviting the parties to adduce further expert evidence regarding the level of depreciation which should be allowed (para. 10.12, 10.13 and 11.2). It indicated that this evidence would be addressed to (para. 11.2) to:

> *"the age, condition and likely useful life of the tenant assets so as to arrive at a figure for depreciation in respect of same for valuation purposes*."

22. The Tribunal made the following finding in respect of the payroll saving (at para. 10.5):

> *"The Appellant's financial year ended on the 31 December 2014 and so those accounts cover a period of three months before and a period of nine months after the valuation date. Trading accounts are a 'snapshot' on a particular date representing the trading experience of the occupier over the period. If the accounts relate in part to a period prior to the valuation date, they represent, to that extent, what the occupier's experience was during that time. The Tribunal has no difficulty with the parties' agreement to use the figures for the year ending 31 December 2014 provided the post-valuation date figures do not relate to an event which could not have been contemplated at the valuation date. The Tribunal is only concerned with rental value, in the hypothetical market, at the valuation date, not with assessing, at that date a fact that lies in the future."*

23. As for the payroll saving issue, the Tribunal held that a pay reduction agreement which gave rise to the payroll saving of €4,080,000 was reached in the September 2014 and extended over a 35-month period from October 2014 to September 2016. Furthermore, the evidence of the NAV of the property ought to be ascertained by looking at the accounts prior to the valuation date as the hypothetical tenant considers his rental bid as at that date. At the valuation date the hypothetical tenant would not have been aware of the staff pay agreement and so would not have expected to make any saving in terms of staff wages. Iarnród Éireann's financial year ended on the 31st December and those accounts cover a period of 3 months before and a period of 9 months after the valuation date.

24. The Tribunal had no difficulties with the parties' agreement to use the figures for the year ending the 31st of December, 2014 provided that the post-valuation date figures did not relate to an event which could not have been contemplated at the valuation date as the Tribunal was concerned with the rental value, in a hypothetical market, at the valuation date, and not with assessing at that date a fact that lies in the future. The Tribunal further held that even if it was appropriate to admit all the figures in Iarnród Éireann's 2014 accounts which were prepared after the valuation date, the hypothetical tenant's rental bid was not limited to a consideration of the year immediately following the valuation date but could extend to future years. The Tribunal also held that the hypothetical tenant would not have considered the payroll

saving a reliable factor or one that had any real prospect of continuation on a year-to-year basis given that it was an agreement negotiated consequent upon a recession leading to an economic crisis.

25. The Tribunal found in respect of the pay reduction agreement (at para. 10.6):

> *"Even if it is appropriate to admit all the figures in the 2014 accounts which were prepared after the valuation date, the question is whether it would be reasonable for the hypothetical tenant to assume that he would benefit from the same payroll saving in the event he took the tenancy. The hypothetical tenant's rental bid is not limited to a consideration of the year immediately following the valuation date only but will extend to future years. In the Tribunal's view, the hypothetical tenant would not have considered the payroll saving a reliable factor or one that had any real prospect of continuation on a year to year basis given that it was an agreement negotiated consequent upon a recession which led to an economic crisis*."

26. The Tribunal determined that a payroll saving of €4,080,000 on foot of a pay reduction agreement reached in September, 2014 should not have been taken into account in calculating the valuation.

27. The Valuation Tribunal has stated questions of law for the opinion of the High Court pursuant to s. 39 of the 2001 Act upon a request in writing from the Commissioner dated the 30th of June, 2020. It is for this reason that a further hearing regarding the level of depreciation to be taken into account in determining valuation has not taken place because of this appeal taken by the Commissioner.

28. The facts agreed or found for the purpose of the case stated are:

> *"3.1 The Global valuation was the third Global valuation, the previous Global valuations having been carried out in 2005 and 2010.*
>
> *3.2 The Subject property is the national railway network operated by the Appellant and located around the State. It comprises the railway running lines and non-running lines currently in use; the stations currently in use; maintenance depots for infrastructure*

and rolling stock, and; stores, offices, and other buildings directly related to the operation of the network.

3.3 The Joint Professional Institute and Rating Valuation Forum has provided a detailed written Guidance Note to be used on the properties to be valued by reference to the Receipts and Expenditure ("R & E") method. Both parties accepted that the R & E method was the appropriate method by which to value the Subject Property and relied on the application of the Guidance Note.

3.4 The parties agreed all components of the R & E calculation other than the sums referable to the payroll saving and the depreciation of tenant assets.

3.5 The Appellant's evidence was that a reduction in gross pay agreed with staff and trade unions in September 2014 (the "Pay Reduction Agreement") covered a 25-month metho period from October 2014 to October 2016 and that the overall payroll saving was €8.5 million.

3.6 The sum of €28, 422,000 was claimed for depreciation in the Appellant's 2014 profit and loss account in respect of plant machinery and rolling stock. It was the Appellant's evidence that this sum related only to those assets which were funded by the Appellant, being 25% of the total capital costs of such assets.

3.7 The Appellant's evidence was that the depreciation shown in the Appellant's accounts may need to be adjusted because of the different approach to depreciation for valuation purposes which requires deprecation to be assessed against the market value of the tenant's items as at the relevant valuation date.

3.8 The Respondent's evidence was that the main elements in determining the appropriate valuation according to the R & E methodology were as follows:

i. Identifying the gross income to be derived from the network;

ii. Deducting the various costs that would be necessary to operate the network to create income;

iii. *Deducting the average annual cost of repairs, maintenance, and renewals on the network;*

iv. *Removing the estimated annual amount to be paid as local authority rates;*

v. *Making a deduction for the hypothetical tenant's return or profit;*

vi. *The remaining balance is the amount available for rent or the Net Annual Value ("NAV") of the network.*

3.9 The Respondent's evidence was that it had assumed, as it had in the previous Global valuations that the State, as part of its public transportation policy, had paid for the rolling stock and similar assets and consequently no allowance was made by the Respondent for the replacement of assets by way of depreciation.

3.10 The Respondent's evidence was that while the expected useful lives of the Appellant's assets are recorded as 4 to 20 years for railway rolling stock, 1 to 10 years for road freight vehicles and 3 to 30 years for plant and machinery, the depreciated amounts in the accounts did not reflect the benefit of the assets actually in use given that several classes of locomotive had remained in operational use beyond 20 years."

29. The questions of law stated are:

1) Did the Tribunal err in law in determining that depreciation of the Appellant's tenant's items is an allowable expense in the R & E calculation?
2) Did the Tribunal err in law in determining that the payroll saving of €4,080,000 which resulted from the Pay Reduction Agreement should not have been included as a reduction in the Appellant's costs in the Respondent's R & E calculation?
3) Did the Tribunal err in law in determining that the Respondent was not entitled to have regard to the Pay Reduction Agreement concluded in September 2014, while simultaneously accepting that the NAV of the Subject Property was to be assessed on the Appellant's 2014 accounts?

STATUTORY FRAMEWORK

30. Under s. 53(1) of the 2001 Act the Minister may, by order, require the Commissioner to carry out a valuation of relevant property wherever situated and occupied by a specified public utility undertaking for the principal purpose for which the undertaking carries on business. Section 53(6) requires the Commissioner to carry out a further global valuation with respect to the relevant property occupied by the undertaking in the fifth year after the year in which a global valuation is carried out.

31. With regard to Iarnród Éireann, the first global valuation was carried out pursuant to the Valuation Act 2001 (Global Valuation) (Iarnród Éireann) Order 2004 (S.I. No. 708/2004). This first valuation was by reference to a date on the 1st of March, 2004 and was entered in the Valuation List on the 1st of December, 2005. Subsequently, pursuant to s. 53(6) a global valuation was entered in the Valuation List in 2010 for a valuation date in March, 2009 and then again in November, 2015 for a valuation date in March, 2014.

32. Section 48(1) of the Act states that the value of a relevant property is to be determined by estimating the "*net annual value*" of the property. The term *"net annual value*" is defined in s. 48(3) as follows:

> "*...the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year, on the assumption that the probable average cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes in respect of the property, are borne by the tenant*."

33. Section 39(5) of the 2001 Act defines the jurisdiction of the Court on an appeal by way of case stated from a decision of the Tribunal. It provides:

> *"The High Court shall hear and determine any question or questions of law arising on the case, and shall reverse, affirm or amend the determination in respect of which the case has been stated, or shall remit the matter to the Tribunal with the opinion of the Court thereon, or may make such other order in relation to the matter as the Court thinks fit."*

PRINCIPLES APPLICABLE TO APPEAL BY WAY OF CASE STATED

34. There is no dispute between the parties as to the principles applicable to an appeal by way of case stated.

35. In *Mara v. Hummingbird* [1982] I.L.R.M. 421, Kenny J. in the Supreme Court explained the approach which a court should take when examining the determination of an expert body:

> "*A Case Stated consists in part of findings on questions of primary fact, e.g. with what intention did the taxpayers purchase the Baggot Street premises. These findings on primary facts should not be set aside by the Courts unless there was no evidence whatever to support them. The Commissioner then goes on in the Case Stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the Court should approach these in a different way. If they are based on the interpretation of documents, the Court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the Commissioner. If the conclusions from the primary facts are ones which no reasonable Commissioner could draw, the Court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be aside unless the inferences which he made from the primary facts were ones that no reasonable Commissioner could draw.*"

36. The legal principles governing the jurisdiction of the High Court in an appeal on a point of law were considered by the Supreme Court in *Attorney General v. Davis* [2018] 2 I.R. 357. In that case McKechnie J. held (at para. 53) that a statutory appeal on a point of law will enable the Court to interfere with a decision appealed against in four-overlapping-circumstances as follows:

1) errors of law as generally understood;

2) errors such as would give rise to judicial review including illegality; irrationality, defective or absence of reasoning, and procedural errors of some significance;
3) errors which may arise in the exercise of discretion which are plainly wrong; and
4) certain errors of fact.

37. McKechnie J. went on to identify (at para. 54) the issues of fact which may be regarded as issues of law:

> *"i. findings of primary fact where there is no evidence to support them;*
>
> *ii. findings of primary fact which no reasonable decision-making body could make;*
>
> *iii. inferences or conclusions:*
>
> - *which are unsustainable by reason of one or more of the matters listed above;*
> - *which could not follow or be deducible from the primary findings as made; or*
> - *which are based on an incorrect interpretation of documents."*

THE CORRECT APPROACH TO VALUATION OF THE PROPERTY: DISCUSSION AND DECISION

38. There is a large degree of artificiality in the valuation process as it concerns public utility undertakings. The property of public utility undertaking, such as Iarnród Éireann, is unique and is not capable of being rated by reference to market valuations or comparative rentals. This difficulty was alluded to by Murphy J. in *Port of Cork Company v Commissioner of Valuation* [2007] IEHC 278 where he observed that:

> "*There would be no difficulty at all if there were an actual letting in the open market by a willing lessor and a willing lessee. Rent review, comparable lettings will form the basis of the ascertainment of the open market rent. In the case of the appellant there is, of course, no actual letting and the exercise becomes hypothetical. Unfortunately, in the case of substantial port undertakings there are no comparables available*."

39. In the absence of comparables, it is necessary to adopt a different method of valuation in order to estimate the net annual value of the property and the preferred method which has emerged for the valuation of the property of a public utility undertaking such as this one is the

so-called *R&E"* Method. There is no dispute between the parties in this regard. Both parties refer to the decision in *Kingston Union A.C. v Metropolitan Water Board* [1926] A.C. 331 as an authority for the correctness of this approach which is now long established. Here, the House of Lords held that, unless special circumstances applied, public utility undertakings were required to be valued on the receipts and expenditure basis (see generally Guy Roots KC, 'Ryde on Rating and the Council Tax', (LexisNexis, 14th ed., 1991), Chapter 8).

40. In reliance on decisions in cases such as *Kingston Union A.C. v Metropolitan Water Board* [1926] AC 331, the *R & E* method of calculating rateable valuations (variously and confusingly referred to as "*the profits basis*", "*the profits method*" and "*the accounts method*") has become the preferred method used to value public utilities. Viscount Cave L.C. in his speech in *Kingston Union A.C.* summarised the *R & E* method or approach to valuation as follows (at p. 339):

> *"From the gross receipts of the undertakers for the preceding year they deducted working expenses, an allowance for tenant's profit, and the cost of repairs and other statutable deductions, and treated the balance remaining (which would presumably represent the rent which a tenant would be willing to pay for the undertaking) as the rateable value of the entire concern."*

41. In plain terms it seems that the method may be defined as a method to ascertain the rental value of a property, for the purposes of rating, by reference to the receipts and expenditure, adjusted as necessary, of an undertaking carried on at the property. What is sought to be approximated is the market rental value of the property calculated by reference to what is available to pay rent once the costs of business are taken into account. The divisible balance is the sum available to be shared between the landlord and the tenant when the costs of business have been deducted. This balance in divided on the basis of a return to the tenant on the tenant's capital employed in the venture and a reward for the venture and the landlord's share is the sum available as rent which is also then the rateable valuation.

Depreciation Issue

42. As clear from the extract from the decision quoted above, the Tribunal based its conclusion that depreciation was an allowable expense in the *RICS Guidance Note*. This *Guidance Note* states (paras. 5.38 and 5.39):

> *"5.38 Valuers will need to decide whether it is more appropriate to adopt a depreciation approach or to set up a sinking fund when considering renewal of tenant's assets. It is possible that, in appropriate cases, both approaches may be adopted in considering different elements within the valuation. However, care must be taken to ensure there is no duplication in such cases.*
>
> *5.39 Accounts often include a deduction for depreciation in the value of the assets used as a way of allowing for the reduction in the economic contribution of those items. Such reduction in value may arise from age, deterioration or obsolescence due to changes in technology, the market or other matters."*

43. The Commissioner's difficulty with the position of the Tribunal with regard to depreciation is that it amounts to what is contended to be a significant departure in principle from the authoritative statement of the *R&E* method in *Kingston Union.* The Commissioner's position is that the only question that ought to arise is whether depreciation on tenant's items, in this instance rolling stock, counts as a *working expense* to be deducted from the gross receipts of the undertaking. While the Tribunal acknowledges in its decision that depreciation as generally understood is an *allowance* rather than an expense, i.e. it is notional because the undertaking is not in fact engaged in any actual expenditure year-on-year in respect of the relevant asset of the tenant, the Commissioner maintains that if it is not an actual expense, then it is not deductible in the *R&E* calculation.

44. The Commissioner submits that it is unsafe to rely on the *RICS Guidance Note* as governing the situation for two reasons: first, it is not legally authoritative even in the jurisdictions for which it has been prepared (i.e. England and Wales and Scotland) and, secondly, it has not been written with input from either the Valuation Office or rating experts in Ireland to reflect the provisions of the 2001 Act or associated Irish jurisprudence. In this regard, I was referred to the judgment of Owens J. in *Commissioner of Valuation v. Hibernian Wind Power Limited* [2021] IEHC 49 where he pointed out (at para. 20) that the *Guidance Note*

has no legal status. Owens J. noted in his judgment that there is no rule of law which requires that any particular method of valuation must be adopted for rating.

45. The Commissioner further contends that the relevant statements in the *RICS Guidance Note* have been misinterpreted or "*at least incompletely understood by the Tribunal*". The Commissioner contends that what is clear from para. 5.38, as set out above, is that the *RICS Guidance Note* concedes that depreciation is only deductible when considering renewal of tenant's assets, that is, at the point in time when it is functionally equivalent to a sinking fund and the tenant is confronted with actual expenditure on new tenant items to replace old ones and may or may not be able to recoup a proportion of the expense when disposing of those old items. The Commissioner contends that the Tribunal fell into gross error in its understanding of the *RICS Guidance Note* by permitting depreciation to be treated as an allowance wholly without regard to whether there was any event of renewal of the tenant's items in question.

46. It is argued on behalf of the Commissioner that to the extent that the Tribunal is correct in its reading of the *RICS Guidance Note,* which is to the effect that depreciation is an autonomous expense that may be taken into account in calculating the NAV under s. 48(3), that guidance is at odds with previous decisions of the Tribunal where in the absence of actual expenditure the Tribunal has refused to accept an allowance for depreciation. I have been referred to the decision of the Tribunal in VA93/4/015 *East Link Ltd. v Commissioner of Valuation* and the later decision in *Port of Cork Company v. Commissioner of Valuation* [2007] IEHC 278.

47. The Commissioner acknowledges that the Tribunal held partially with the Commissioner in so far as it held that depreciation, when properly deducted, could only ever be calculated by reference to the market value of the tenant's items rather than any notional value appearing in the balance sheet of the undertaking; however, it is the Commissioner's position that this exercise can only begin when there has been a renewal of the tenant's assets in the first place. Accordingly, unless Iarnród Éireann were replacing rolling stock on which it wished to claim an allowance for depreciation in the NAV, then the Commissioner contends, even under the *RICS Guidance Note*, the matter simply does not arise.

48. Insofar as the Tribunal determined that the *R & E* approach requires expert opinion in this case about the tenant's items at the relevant valuation date bearing in mind their condition and likely useful life, the Commissioner maintains that this finding underlines the fact that the sums claimed for depreciation (the allowance for depreciation which is claimed by Iarnród Éireann in this case was €28,422,000 calculated as a proportion of its rolling stock which it claimed to have paid for itself) are notional and bear no relationship to any real calculation as to any fall in value caused by the reduction in the useful economic life of the tenant's assets. Critically, the Commissioner contends, the conclusion that the figures for depreciation as appearing in Iarnród Éireann's global valuation calculations are wholly unsustainable is fundamentally at odds with the Tribunal's conclusion that depreciation is an allowable expense which may be taken into account in the valuation of the subject property.

49. As the valuation was based on the 2014 accounts by agreement between the parties, the Commissioner contends that the rejection of the evidence of Mr. Graham, in respect of the sum claimed for depreciation cannot be reconciled with the Tribunal's determination that depreciation is nevertheless allowable. This is a conclusion which the Commissioner maintains is unsustainable because unsupported by the evidence. It is further contended that it constitutes an error of law as described by the Supreme Court in *Attorney General v Davis* [2018] 2 I.R. 357. It is submitted that the Tribunal's finding that Iarnród Éireann relied on depreciation figures shown in its 2014 Accounts which bear little or no relation to their market value on the valuation date, should have resulted in a finding by the Tribunal that the Commissioner was correct to exclude those figures when calculating the valuation.

50. It is argued that it is implicit in the Tribunal's conclusion that it accepts that Iarnród Éireann is entitled to disregard the figures recorded in their filed accounts in respect of depreciation and to return to the Tribunal at a later date with entirely new figures and new evidence to support those figures, which would by definition only come into existence years after the rate was struck. The Commissioner contends that the fact that the allowance for depreciation which is claimed by Iarnród Éireann is a sum which is based on the historic costs of the assets underlines the reality that the sum claimed is not a true expense in the sense in which that term is used in section 48(3) and should not be treated as such.

51. Iarnród Éireann for its part argues that the Commissioner's view, that an allowance for renewals should only be made having regard to actual expenditure as and when it is incurred,

is both simplistic and wrong. It is submitted that the almost universal practice, and the practice exhorted by the *RICS Guidance Note*, is to amortise the cost of renewals over time to achieve consistency across rating periods and to ensure that large capital expenditure does not drastically skew the rating exercise in a particular period. In support of its position, Iarnród Éireann refers to the decision of the Supreme Court in *Great Northern Railway v Commissioner of Valuation* [1940] 1 I.R. 247 where the Court found that that the capital cost of providing the rolling stock is a capital cost to the tenant which must be factored into the hypothetical rent.

52. Iarnród Éireann also refers to *Commissioner of Valuation v. Hibernian Wind Power Limited* [2021] IEHC 49 [hereinafter the "*Hibernian Wind Power"*] where a case was stated to the High Court on, *inter alia*, the question of whether the Tribunal was correct in allowing a deduction of an average annual amount calculated over a 15-year period to establish a fund to enable the tenant to replace physical assets which will be worn out at the end of a 20-year period and the Court found that the Tribunal was correct. Iarnród Éireann argues that in the *Hibernian Wind Power* case, the Court was not concerned with an actual sinking fund established by the ratepayer but rather with what the hypothetical tenant might set aside to cover replacement. Iarnród Éireann contends that the "*averaging out*" of the cost of renewal which was permitted as an allowable expense in the *Hibernian Wind Power* case is precisely what the depreciation approach advocated by Iarnród Éireann allows for.

53. To resolve the dispute between the parties on this case stated and to answer the questions posed, it is necessary to consider more fully the relevant caselaw. It is clear that the purpose of the valuation exercise is to ascribe a notional rental value to property which is never let so that its net annual value can be estimated in accordance with the statutory criteria identified in s. 48(3). Given the process is directed to assessing a necessarily notional value as opposed to a real value, a degree of flexibility inheres in s. 48(3) so long as the assessment approach adopted is directed to valuing the property on the basis of statutorily prescribed assumptions.

54. I take as my starting position the fact that I have not been directed to any rule which says that depreciation of tenant's moveable assets is not an allowable cost or expense of business. Insofar as I must consider whether the Tribunal has erred in law, I consider the absence of a prescribed rule which it can be said has been breached to be important. As noted by Owens J. in the *Hibernian Wind Case* with reference to s. 48(3) of the 2001 Act and the

RICS Guidance Note, there is no rule of law which requires that any particular method of valuation must be adopted for rating. The purpose of the valuation exercise is to ascribe a notional rental value to property which is never let so that its net annual value can be estimated in accordance with the statutory criteria identified in s. 48(3). Given the process is directed to assessing a necessarily notional value as opposed to a real value, a degree of flexibility inheres in s. 48(3) so long as the assessment approach adopted is directed to valuing the property on the basis of statutorily prescribed assumptions.

55. Indeed, not only have I not been referred to a rule which has been breached by the Tribunal but in *Great Northern Railway v Commissioner of Valuation* [1940] 1 I.R. 247, an authority which deals precisely with railway rolling stock, it was expressly held by each of the three judges, that the capital cost of providing the rolling stock is a capital cost to the tenant which must be factored into the hypothetical rent. In that case both the company and the Commissioner used the "*profits*" method of calculation, but the Company's position was that the capital value of the tenant's chattels was estimated on the basis of the cost of manufacture and production less a proper allowance for depreciation and obsolescence. Before finding that the Company's approach to calculation was correct, Sullivan CJ records in his judgment (p. 269) that:

> *"this was unquestionably the method recognised both here and in England as the usual and proper methodof estimating the value of such chattels and two expert valuers, Mr. Lisney and Mr. Liddle, who gave evidence at the hearing, said that they knew of no other method."*

56. Clearly, there are distinguishing features between *Great Northern Railway v Commissioner of Valuation* and this case, most notably that specific legislation applied to the rateable valuation of railways at that time in the form of the Railways (Valuation for Rating) Act, 1931. Section 5 of that Act provided for a statutory formula for calculating receipts and expenditure which prescribed at s. 5(3)(b) in respect of allowable expenditure as follows:

> *"the amount properly charged in that year as revenue expenditure in respect of management, working, maintenance and renewals (including maintenance and renewal of plant and rolling stock) and in respect of rates and tithe rent charge (if any), subject however to the adjustments hereinafter mentioned…."*

57. While the terms of this provision differ from s. 48(3) of the 2001 Act, neither does it expressly allow for depreciation. This notwithstanding, it is noteworthy that when estimating the value of the capital supplied by the tenant in that case, the Supreme Court considered it appropriate to make a "*proper allowance for depreciation and obsolescence*". In his judgment Meredith J. referred to the fact that provision was made for the deduction from net profits expenditure in respect of maintenance and renewals (including maintenance and renewal of plant and rolling stock) and stated (p. 276):

> *"…it would be ridiculous to provide for this deduction if the tenant were not to get credit for the plant and rolling stock if it all happened to be in hand and perfectly new. This, by the way, is a last nail in the coffin of the contention that the value of the tenant's specialised chattels, estimated on the basis of cost of replacement, less depreciation and obsolescence, may be disregarded."*

58. The Commissioner in this case acknowledges that deduction would be permissible under s. 48(3) of the 2001 Act where it relates to a maintenance or renewal expense. This begs the question as to why it is therefore not also ridiculous to allow for this deduction but not give the tenant credit for the plant and rolling stock in hand in accordance with the Supreme Court's findings in *Great Northern Railway v Commissioner of Valuation.* I have not identified any legitimate basis arising from the different statutory provisions for finding that decision no longer good authority in identifying the correct legal approach in this case with reference to s. 48(3) of the 2001 Act.

59. Turning next to consider the *Hibernian Wind Power* case, it is relevant to note the common position which was adopted by the parties in that case as recorded in the judgment of Owens J. (para.6):

> "*It was also common case that it was appropriate, when using the R&E method, to make an allowance against gross receipts for the sum which the hypothetical tenant would be required to set aside, year by year, out of revenue in order to provide a sinking fund to cover replacement of the wind turbines. This annual expense is brought into account as a tenant's expense "necessary to maintain" the property in a state to command the hypothetical rent in calculating the sum available as the divisible balance.*"

60. In *Hibernian Wind Power*, Owens J. held as follows (at para. 16):

> *"The wording of s. 48(3) of the 2001 Act does not permit the "probable average cost" of an outlay which will be necessary in order to maintain the property in its current state at the end of 20 years to be calculated by reference to a 15 year period. The requirement to average out the probable costs and expenses "that would be necessary to maintain the property" and quantify them as an annual amount has a clear context. The purpose is to arrive at "the rent for which, one year with another, the property might…, be reasonably expected to let from year to year" at the valuation date on the basis of a yearly tenancy which is of indefinite duration.*"

61. The primary issues which appear to have concerned the Court in the *Hibernian Wind Farm* were whether the Tribunal was correct in accepting an approach which assessed probable average cost by a lesser period than the life span of the wind turbine and in declining to accept evidence based on an extrapolation from the receipts and expenses accounts of other wind farms and not the windfarm in question. From my reading of the judgment, it appears to have been accepted by the parties and was not the question referred to the court, that when using the *R&E* method, it is appropriate to make an allowance against gross receipts for the sum which the hypothetical tenant would be required to set aside, year by year, out of revenue in order to provide a sinking fund to cover replacement of the plant and machinery appearing in the accounts as a tenant's expense "*necessary to maintain*" the property in a state to command the hypothetical rent in calculating the sum available as the divisible balance. Accordingly, in my view, the approach adopted in the *Hibernian Wind Farm* case in accepting an averaging out of the cost of renewal is entirely consistent with the approach favoured by the Tribunal here in accepting that an allowance for depreciation is appropriate in estimating rental values for rateable purposes.

62. While it is suggested that the approach of the Tribunal in this case is not reconcilable with its approach in other cases such as VA93/4/015 VA96/4/016 & VA96/4/017 & VA93/4/016 *East Link Ltd. v Commissioner of Valuation*, I do not agree. In *East Link Ltd.* the hereditaments which fell to be rated were "*tolls*" and not toll roads, toll buildings or other ancillary works or structures (para. 9). There was a dispute between the parties as to whether

the "*contractor's basis*" or the "*profits method*" should be used to determine rateable valuation, with the Tribunal preferring the "*profits (or R & E) method*". It had been urged during the course of the appeal that, irrespective of the method to be applied, a percentage discount, suggested at 10%, should be allowed in order to cover the physical obsolescence of the roads and structures from which the tolls were derived. The Tribunal found (para. 30):

> *"Each case must be considered on its own merits having regard to the nature of the hereditament. Repairs themselves may also be of a different kind and thus may be treated differently in the accounts. General repairs of a repetitive nature may be dealt with under the straightforward heading of "repairs" or "maintenance costs". On the other hand, it may be that the tenant would wish to make provision for the possibility of having to carry out a major or substantial repair at some unspecified time in the future and he might do so by the establishment of a reserve or sinking fund or the like. In principle, if it was reasonable for the hypothetical tenant to make such provision by this or some other appropriate means then that cost in whole or in part may be allowed."*

63. In *East Link Ltd.* the Tribunal then proceeded to hold, without determining in direct terms whether it was reasonable for the tenant to seek to have a percentage discount allowed in order to cover the physical obsolescence of the roads and structures from which the tolls were derived, as follows (at para. 31):

> *"In this case, under the heading of 'Expenditure' in the Accounts there are sums inserted for 'Other Operating Costs' and for 'Maintenance Costs'. As stated above this had been deducted and allowed in full so far as the evidence went. There was no further provision in the accounts for either repair or maintenance or for any physical or functional obsolescence. Since the preferred method of valuation in this case is one based on and derived from the accounts (with appropriate adjustments) it would in our view be quite wrong to allow any deduction under this heading. On principle in any event it is our opinion that it would be quite inappropriate to allow any generalised percentage reduction. Rather, if provision had been made in the accounts, one would have analysed the position in the manner above indicated. If, at some future time, such*

provision is within the accounts then that matter can be taken into consideration in a further revision but at present no deduction will be allowed."

64. The ratio of this decision is clearly predicated on the undoubtedly correct position that roads and toll buildings are not properly treated as tenant items and whilst allowance might be made for repair and maintenance as a tenant expense, the cost of rebuilding or reconstructing the road would not. In my view, the findings in the *East Link Ltd*. case must be seen in this light and therefore to have limited relevance to a consideration of the issue in this case where it is not disputed but that the Tribunal was concerned with tenant items when considering the position of rolling stock.

65. Similarly, in the *Port of Cork Company v. Commissioner of Valuation* [2007] IEHC 278, the Tribunal and subsequently the Court were not concerned with the depreciation of moveables. The major item in dispute in that case was the allowance of an annual depreciation charge in respect of the buildings, piers and quays, dredging (albeit that dredging was a separate account item appearing specifically in the profit and loss account over several years and therefore already factored in) and site development works. As recorded in the judgment of Murphy J. in answering the case stated, the Tribunal had held that depreciation in respect of these items could not be the tenant's responsibility because if it were then the tenant would be assuming the role of the lessor/landlord. In his judgment, Murphy J. noted that (p. 10):

"The Tribunal had some sympathy for the general proposition that where there was no reserve or sinking fund or like provision in the accounts and where such a provision would be reasonable having regard to the nature of the property then the valuer should exercise his/her judgment and make such a notional provision as he/she considers necessary or appropriate. However, in the light of the East Link judgment and in the absence of any evidence as to how this notional provision might be calculated (other than by having some regard to the annual depreciation charge) the Tribunal finds itself constrained from making any such allowance). Should the policy of the appellant change so as to provide for the establishment of a reserve or specific fund or some other method of provision to meet anticipated expenditure at some further revision or revaluation stage, the matter could be looked at."

66. It seems to me that the *Port of Cork* case is not an authority for asserting that depreciation on moveables, or any other tenant's items, is to be disallowed for rating purposes. The judgment does not decide that depreciation could or should be disallowed for tenant's items. On the contrary, that judgment by its terms expressly recognised that depreciation is allowable on tenants' items (para. 6.1, p. 12). A proper consideration of the facts in that case shows that depreciation was allowed in full on those items respectively labelled "*plant and machinery*" and "*floating craft*" (both moveables/tenant's items) but was disallowed on buildings, land and dock structures.

67. I fully appreciate that identifying a rental value for the subject properties is a notional exercise based on a series of hypotheticals but it seems to me to be too artificial and disconnected from reality to ignore that Iarnród Éireann's working expenses include depreciation of rolling stock which it has bought and paid for. Estimating a rental value necessarily involves regard to the tenant cost of operating the public utility in order to make a profit in determining how much a tenant could afford to pay in rent. In this case Iarnród Éireann has supplied some of the rolling stock, plant and machinery which is necessary to derive commercial value from the relevant property. The economic value of those assets will be eaten up over time and they will require to be replaced. This diminution in value is a necessary incident of operating the tenant's enterprise. The Commissioner does not explain how the historic cost of providing the rolling stock is to be allowed for, if not through a depreciation model. In arriving at a rateable valuation which is based on receipts and expenditure, it seems to me that this valuation model must logically permit of some means of measuring costs already incurred in providing the *existing* items of rolling stock.

68. While I note the fact that previous rateable valuations were not concluded on a basis of an allowance for depreciation this does not assume a legal significance for this case in circumstances where there has been no previous contested determination by the Tribunal with regard to the treatment of Iarnród Éireann's rolling stock in circumstances where on the two previous occasions of valuation since the commencement of the 2001 Act agreement was reached with the Commissioner without recourse to the Tribunal. In my view it was within Iarnród Éireann's right to agree a position on previous valuations for the purpose of those valuations without being precluded from arguing that the application of the method was flawed when the valuation process took place in 2014.

69. The decision of the Tribunal in this case is based on the fact that it accepts that where Iarnród Éireann paid for rolling stock from its own funds (claimed to be in the order of 25% of rolling stock), then this is a tenant's item in respect of which an allowance for depreciation is appropriate as there was indeed actual expenditure on the part of the tenant. From a principled position, the approach adopted by the Tribunal seems to me to be wholly consistent with establishing a rental value for the subject properties. I understand in this regard that when conducting an initial assessment, the Commissioner may not have appreciated that where Iarnród Éireann had paid for any of its rolling stock but proceeded on the basis of an incorrect understanding that all rolling stock was purchased with the assistance of state intervention. This notwithstanding the Commissioner's position before the Tribunal and before me did not change based on the evidence offered that Iarnród Éireann had directly funded a percentage of the rolling stock from income generated by the public utility.

70. Accordingly, while the Commissioner contends that the *RICS Guidance Note* has been misunderstood, in my view the Commissioner's position with regard to para. 5.38 of the *Guidance Note* suggests an unduly inflexible or rigid approach to the valuation of Iarnród Éireann's property which is case-specific. While the *RICS Guidance Note* makes clear that there should be room within the model adopted to measuring costs depending on the circumstances and particular characteristics of the utility, this position is entirely consistent with the authorities which are clear that there is no hard and fast correct approach. By recording that it is open to valuers to adopt a depreciation approach *or* to set up a sinking fund when considering the renewal of a tenant's assets the *RICS Guidance Note* does no more than suggest an application of the flexibility which the case-law supports in allowing market value to be assessed in a fact specific context. Neither the *RICS Guidance Note* nor the legislation mandate that there is actual renewal before this cost of business is to be taken into account.

71. In my view it is a matter of common sense to acknowledge that depreciation of moveables occurs and represents a cost of business even in years where an actual renewal does not take place, albeit that the older and more unusual the item of stock the more difficult it is to assess its actual value and the proper accounting for depreciation of same. Accordingly, in my view, the Tribunal did not err in principle in deciding that depreciation on a pro rata basis related to the stock actually paid for by Iarnród Éireann in deciding that an evidence-based means of assessing the actual cost to the business should be relied upon to quantify the appropriate level of the allowance.

72. I do not accept the Commissioner's submission that the Tribunal's rejection of Iarnród Éireann's accounts as a basis on which to determine the level of depreciation allowable is somehow irreconcilable with its determination that depreciation is nevertheless allowable. It is recalled that both parties accepted before the Tribunal that the accounting approach to depreciation adopted, in line with accounting standards, in the 2014 Accounts were not appropriate to a valuation exercise. Given the dichotomy in their positions and perhaps in view of the Commissioner's erroneous belief that the State had paid for all rolling stock as the basis for its initial decision, neither side had produced valuation evidence directed to the market value taking into account the age and character of the individual items.

73. In my view it was open to the Tribunal to find, as a matter of principle, that depreciation was allowable but to also identify a principled approach to calculating the appropriate amount allowable in respect of depreciation in circumstances where it was not satisfied that the amount reflected in Iarnród Éireann's accounts had proper regard to the actual economic value of the rolling stock, some of which at least is understood to be very old. The Tribunal proposal to consider relevant evidence is simply a manifestation of the Tribunal's endeavour to be fair to both sides by arriving at a level for depreciation which reflects the actual value of the rolling stock in circumstances where the figure appearing in the accounts appears to have been arrived at on a notional and based on historic cost rather than with regard to the age and character of the individual items and any residual value or real market value basis and where neither side had adduced evidence directed to the question the Tribunal had to determine.

74. While the parties agreed to use the 2014 accounts in evidence, I am satisfied that the decision maker is not bound to confine its consideration to those accounts and is free to receive other evidence where it considers it appropriate or necessary to do so. In this instance, where it was determined that accounting evidence reflected the historic cost of the rolling stock rather than the market value in 2014 and where it was determined that allowable depreciation fell to be calculated not by reference to historic cost but by reference to its market value, then clearly other evidence was required to enable a decision properly grounded in evidence to be reached.

75. The related question is whether it was open to the Tribunal, on an appeal from the Commissioner, to direct further evidence as to the level of depreciation which should be allowed in this particular case. It seems to me that the answer to this question must turn on the

parameters of the Tribunal's jurisdiction on appeal. Specifically, if the Tribunal is vested with a *de novo* power to determine the rateable value, then it seems to me that it must follow that the Tribunal has power, having determined its principled approach to the question of depreciation when applying an *R&E* method in the context of Iarnród Éireann's rolling stock, to then consider expert evidence adduced to determine what the allowable cost should be on an application of this principled approach as the Tribunal is charged with determining the rateable value in the place of the Commissioner. Considering the terms of ss. 34, 37 and 54 of the 2001 Act (as amended), I am satisfied that the Tribunal has equivalent powers to the Commissioner to determine the valuation of the property the subject of the appeal of, or any other detail in relation to, the property, the subject of the appeal. I am reinforced in this conclusion by the fact that no provision is made for the question of valuation to be determined by the Commissioner on a remittal from the Tribunal where it decides that the Commissioner has erred in the principled approach taken. The Tribunal's role on appeal is not the same as a court in judicial review proceedings where the Court considers the matter on the basis of the evidence before the first instance decision maker.

76. In circumstances where the Tribunal is vested with a jurisdiction to determine the value of the property, I am satisfied that it did not err in law in the approach favoured by it in its decision in permitting a reconvened hearing at which further evidence could be called directed to the approach identified by it as the appropriate means of determining valuation, particularly where the approach favoured by the Tribunal had not been the approach adopted by either party previously and therefore had not been addressed in evidence. Indeed, this approach is consistent with the requirements of fair procedures in that it affords the ratepayer an opportunity to adduce relevant and focussed evidence directed to the principled approach identified by the Tribunal but without excluding the Commissioner from an entitlement to be heard in this regard.

77. I agree with the submission on behalf of Iarnród Éireann that it was perfectly open to the Tribunal to find, as a matter of principle, that depreciation was allowable and to direct further evidence as to the level of depreciation which should be allowed in this particular case. This is particularly so where principled conclusion as to the correct approach determined by the Tribunal is one which differed from the starting position of both parties in coming to the Tribunal. The Tribunal having rejected both the Commissioner's approach in refusing to make any allowance for depreciation and Iarnród Éireann's approach in relating depreciation to

historic cost, did not then have the benefit of evidence addressed to the actual question framed by the Tribunal as the appropriate one, namely, that depreciation is a valuation matter to be decided upon expert evidence which takes into account the age and character of the individual items.

Payroll Issue

78. The payroll issue was identified by the parties as very much a subsidiary issue and most focus during argument was directed to the depreciation question. Nonetheless, the question remains live before me. On the payroll issue, the Commissioner refers to *Ryde on Rating* which states at para. 665.1:

> *"It must be remembered that the receipts and expenditure method involves using the actual occupier's profits as shown in its accounts as evidence of what the hypothetical tenant would expect to earn in the year commencing on the valuation date, thus enabling a judgment to be made as to the proportion of those profits which the hypothetical landlord and tenant would agree upon as rent…..The year in respect of which the rent is to be agreed lies ahead, and the rent for the year ahead should reflect the profits expected to be earned in the year ahead."*

79. And at para. 672 it is stated:

> *"The practice for many years was to base the valuation on the last accounts available, but to admit in evidence both before assessment committees and quarter sessions the latest available accounts. Where these accounts merely illustrated the working of factors in existence at the material date, the practice could be supported; but it could not extend to the admission of accounts showing the working of a factor which would not have been in the mind of any reasonable hypothetical tenant at the valuation date."*

80. The Commissioner contends that there is a fundamental inconsistency between the Tribunal's decision to permit the use of the 2014 accounts as the basis for the calculation of the NAV and the refusal to factor in a portion of the payroll saving on the basis that the pay reduction agreement was reached in October 2014, after the valuation date. It is submitted that

the evidential basis for the Tribunal's finding that the pay reduction agreement was not in the contemplation of Iarnród Éireann in March 2014 is not identified clearly in the Tribunal's determination. The Commissioner submits that it is clear from paragraph 665.1 of *Ryde On Rating*, set out above, that the *R& E* method involves using the actual occupier's profits as shown in its accounts as evidence of what the hypothetical tenant would expect to earn in the year commencing on the valuation date. Therefore, it is submitted, if it is appropriate to admit all the figures in the 2014 accounts, as the Tribunal contemplated at paragraph 10.6, the valuation must take account of the fact that there was an actual saving of €4,080,000 made in respect of pay that year.

81. Iarnród Éireann stands over the Tribunal's decision and refers to s. 53(4) of the 2001 Act which expressly requires the global valuation to be carried out as per a specified date. The Valuation Date for the 2015 valuation was the 31st of March, 2014. On this basis it is submitted that the Tribunal finding, as a matter of fact and having heard the evidence of Iarnród Éireann's Financial Controller, that the hypothetical tenant would not have been aware of the staff pay agreement as at the Valuation Date and therefore would not have been expected to make any saving on wages, is entirely logical. The 2015 valuation was required to be based on pay rates which were known on the 31st of March, 2014. Iarnród Éireann in their submissions reject any suggestion that there is any inconsistency in the fact that the Tribunal accepted the reliance which the *Commissioner* placed on Iarnród Éireann's accounts for 2014 when assessing the net annual value. I was referred to section 5.11 of the Guidance Note which provides as follows:

> "*The use of hindsight, i.e. consideration of accounts for years following the AVD, may be used as a means of confirming trends discernible at the AVD*." (emphasis added)

82. I do not agree that the Tribunal's conclusion (on the basis of an acceptance that it was appropriate to rely on the figures in the 2014 accounts) that a saving of the magnitude of the payroll reductions would not have affected the hypothetical tenant's rental bid is not explained. I am quite satisfied that the logic of the Tribunal's position is clear, coherent and rational. The evidence before the Tribunal (as per prècis of evidence of the Financial Controller and has reflected in the decision of the Tribunal) established that there was a once-off pay reduction agreed in September, 2014 for a specified period spanning 25 months. The evidential basis for the conclusion is provided by the evidence of Mr. Graham who confirmed in his evidence to the Tribunal that an agreement was reached with staff and trade unions in September, 2014 to

a reduction in gross pay for a period of 25 months beginning in October, 2014 and ceasing in October, 2016 at which time full pay would be restored (see Prècis of Evidence of David Graham, Financial Controller at para. 2). The valuation date of 31st of March, 2014 preceded the pay reduction agreement by some six months and therefore could not have been within the contemplation of the hypothetical tenant in deciding on market rent for the premises.

83. I see no inconsistency in the Tribunal disregarding those matters appearing in the 2014 accounts which would not have been in the contemplation of the hypothetical tenant as at the Valuation Date, while simultaneously relying on the 2014 accounts to obtain a more accurate assessment of those matters which would have been within the hypothetical tenant's contemplation, e.g. the running costs of the enterprise. At para. 10.5 the Tribunal observed that:

> *"Trading accounts are a 'snapshot' on a particular date representing the trading experience of the occupier over the period. If the accounts relate in part to a period prior to the valuation date, they represent, to that extent, what the occupier's experience was during that time. The Tribunal has no difficulty with the parties' agreement to use the figures for the year ending 31 December 2014 provided the post valuation figures do not relate to an event which could not have been contemplated at the valuation date. The Tribunal is only concerned with rental value, in the hypothetical market, at the valuation date, not with assessing, at that date a fact that lies in the future*."

84. The Tribunal's approach, in this regard, is consistent and logical in my view. The Tribunal further considered (para. 10.6), that even if it were appropriate to admit all the figures in 2014, there could be no assumption on the part of the hypothetical tenant that the same payroll saving would apply in each year of the tenancy. The Tribunal found, as a fact, that the agreement was negotiated against the backdrop of a recession which led to an economic crisis. It was clearly a saving brought about in exceptional circumstances which a tenant would be foolish to assume could be realised in future years. Again, the Tribunal's considerations in this regard were consistent and logical and no error of law has been established consequent upon its approach.

85. I cannot accept the Commissioner's submission that the decision in respect of the payroll saving discloses an absence of reasoning and irrationality which amounts to an error of law under the *Attorney General v. Davis* test.

CONCLUSION

86. I do not consider that the Tribunal's determination that, as a matter of principle, depreciation is an allowable expense when calculating the NAV of the subject property to be erroneous. The Tribunal has not yet determined the amount that is allowable for depreciation and will only make this determination on the basis of expert evidence addressed to the market value of that proportion of the assets which it can be established has been paid for by Iarnród Éireann.

87. Furthermore, I do not consider the Tribunal's determination that the Commissioner was not entitled to have regard to the payroll saving of €4,080,000 which resulted from the pay reduction agreement concluded in September 2014, while simultaneously accepting that the NAV of the Subject Property was to be assessed on the 2014 accounts, to be erroneous.

88. On the questions of law stated, I respond as follows for the reasons elaborated upon above:

1) Did the Tribunal err in law in determining that depreciation of the Appellant's tenant's items is an allowable expense in the *R & E* calculation? No.
2) Did the Tribunal err in law in determining that the payroll saving of €4,080,000 which resulted from the Pay Reduction Agreement should not have been included as a reduction in the Appellant's costs in the Respondent's *R & E* calculation? No.
3) Did the Tribunal err in law in determining that the Respondent was not entitled to have regard to the Pay Reduction Agreement concluded in September 2014, while simultaneously accepting that the NAV of the Subject Property was to be assessed on the Appellant's 2014 accounts? No.

89. In the circumstances, I affirm the decision of the Tribunal.